



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**SUCCESSION CAUSE NO.142 OF 1998 AS CONSOLIDATED WITH**

**SUCCESSION CAUSE NO.1654 OF 1999**

**IN THE MATTER OF THE ESTATE OF THE LATE (MAJOR) CHARLES MUHORO KIONGO  
(DECEASED)**

**MARIA WAIRIMU MUHORO.....PETITIONER**

**VERSUS**

**FRANCISCA MATOLO KAMANTHE.....OBJECTOR**

**R U L I N G**

On 25<sup>th</sup> February 2011, this court ordered the petitioner to pay to the objector the sum of Kshs.500,000/- that she had earlier been directed by the court to pay. The court required the petitioner to pay the said sum within fourteen (14) days of being served with the extracted copy of this court's order, or in default, the objector be at liberty to execute against the petitioner for the said amount. The court had arrived at this decision in the absence of representation of the petitioner. This is because the petitioner's then counsel, a Mr. Wawire, withdrew from acting for the petitioner when the court declined to grant his application for adjournment.

The firm from which Mr. Wawire is an associate duly filed notice of appointment of an advocate after the delivery of the ruling. That firm, P.M. Wamae & Co. Advocates, then filed a notice of motion pursuant to the provisions of **Rules 63 & 73 of the Probate and Administration Rules** and **Order 22 Rule 22(1)** and **Order 45 Rule 1(1), 2(1) and 3 of the Civil Procedure Rules, 2010** seeking to review and set aside the said order issued by this court on 25<sup>th</sup> February 2011 requiring the petitioner to pay to the objector the sum of Kshs.500,000/- within fourteen (14) days of being served. It is the petitioner's contention that the said ruling was made when there was apparent mistakes and errors evident on the face of the said ruling. The grounds in support of the application are stated on the face of the application. The application is supported by the annexed affidavit of Paul Wamae, the advocate for the petitioner. The application is opposed. The objector filed notice of preliminary objection in opposition to the application.

At the hearing of the application, this court heard oral rival submissions made by Mr. Wamae for the petitioner and by Miss Mburugu for the objector. The issue for determination by this court is whether the petitioner established a case to entitle this court review its decision. From the said submissions, it emerged that the petitioner had indeed filed a replying affidavit in opposition to the objector's application. This replying affidavit was however not placed in the court file. There is a possibility that the said replying affidavit could have been mislaid at the registry. It is the duty of a litigant to ensure that any pleadings filed in court is indeed placed in the court file. What is material is that when the court considered the said ruling, it did not have the benefit of reading the said replying affidavit. Mr. Wamae submitted that it is the petitioner's case that she had paid in full the amount that she was ordered to pay to the objector. Miss Mburugu objected to the application on technical grounds.

Having evaluated the facts of this application, it was clear to the court that if the replying affidavit filed by the petitioner was in the court file, this court would most probably have arrived at a different conclusion than it did. Matters were not helped by the fact that the petitioner's advocates appeared to have been bent on frustrating the hearing of the objector's application by unnecessarily and without any

justifiable cause seeking to adjourn the hearing of the same. The fact that the petitioner had filed a replying affidavit to the objector's application was not brought to the attention of the court by either the counsel for the petitioner or the counsel for the objector. In the circumstances therefore, this court is of the opinion that it would serve the ends of justice if the *status quo ante* that existed prior to the hearing of the objector's application is restored so that the same application can be heard on its merits. This court therefore holds that the petitioner established a suitable case for this court to review its ruling dated 25<sup>th</sup> February 2011 on the ground that there was error that was apparent on the face of the record i.e. the court did not consider the replying affidavit of the petitioner which was filed but was not placed in the court file.

In the premises therefore, the petitioner's application dated 9<sup>th</sup> March 2011 is hereby allowed. This court hereby reviews and sets aside its ruling delivered on 25<sup>th</sup> February 2011. The objector's application filed in court on 9<sup>th</sup> December 2010 shall be listed afresh for hearing at the registry. Since the entire mix-up was caused by the conduct of the petitioner's counsel, the petitioner shall pay to the objector the cost of the application which the court assesses at Kshs.10,000/-. The said sum shall be paid within thirty (30) days of today's date or in default the objector shall be at liberty to execute.

**DATED AT NAIROBI THIS 1<sup>ST</sup> DAY OF APRIL, 2011**

**L. KIMARU**  
**JUDGE**